No. 42

In the Supreme Court of the United States

October Term, 1949

UNITED STATES OF AMERICA, PETITIONER,

v.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 42

UNITED STATES OF AMERICA, PETITIONER

v.

LILLIAN SPELAR, AS ADMINISTRATRIX OF THE ESTATE OF MARK SPELAR, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the United States District Court for the Eastern District of New York (R. 5) is reported at 75 F. Supp. 967. The opinion of the United States Court of Appeals for the Second Circuit (R. 10) is reported at 171 F. 2d 208.

JURISDICTION

The judgment of the Court of Appeals was entered December 8, 1948 (R. 14). The petition

for a writ of certiorari was filed on March 8, 1949, and was granted on April 18, 1949. 336 U. S. 950. The jurisdiction of this Court rests upon 28 U. S. C. 1254(1) (1948).

QUESTION PRESENTED

Whether the exclusion from the coverage of the Federal Tort Claims Act of any "claim arising in a foreign country" (28 U. S. C. 2680(k) (1948)) bars, as an unauthorized suit against the United States, an action for wrongful death in accordance with the laws of Newfoundland based on the Government's allegedly negligent operations of an air base at Harmon, Newfoundland held by the United States under agreement with Great Britain.

STATUTE INVOLVED

The Federal Tort Claims Act (60 Stat. 842, 843, 28 U. S. C. 931 (1946) *et seq.*) provided as follows, at the time this action was instituted: [1]

[1] Under the revision of the Judicial Code (Act of June 25, 1948, Pub. Law 773, 80th Cong., 2d sess.), the pertinent sections of the Federal Tort Claims Act are now found in Sections 1346(b), 1402(b), 2674, and 2680 of Title 28, United States Code. The language of Section 410(a) of the Act, formerly 28 U. S. C. 931(a), now 28 U. S. C. 1346(b), was also revised so that it now reads:

> • • • the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States

Sec. 410. (a) Subject to the provisions of this title, the United States district court for the district wherein the plaintiff is resident or wherein the act or omission complained of occurred, including the United States district courts for the Territories and possessions of the United States, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any claim against the United States, for money only, accruing on and after January 1, 1945, on account of damage to or loss of property or on account of personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury, or death in accordance with the law of the place where the act or omission occurred. Subject to the provisions of this title, the United States shall be liable in respect of such claims to the same claimants, in the same manner, and to the same extent as a private individual under like circumstances, except that the United States shall not be liable for interest prior to judgment, or for punitive damages. * * *

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if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred

Respondent's rights, however, are fixed by the law applicable at the time of the institution of her suit.

Sec. 421. The provisions of this title shall not apply to—

* * * * * *

(k) Any claim arising in a foreign country;

* * * * * *

STATEMENT

Lillian Spelar, the respondent, is the administratrix of the estate of her husband, Mark Spelar, a flight engineer employed by American Overseas Airlines, Inc. Mark Spelar was killed on October 3, 1946, when the plane in which he was riding crashed shortly after taking off from Harmon Field, an air base in Newfoundland.[2] This air base is one of the areas leased by the United States from Great Britain pursuant to an Agreement and Leases entered into on March 27, 1941, after an Exchange of Notes on September 2, 1940. See Executive Agreement Serial 235, Leased Naval and Air Bases (GPO, 1942) filed with this Court in connection with *Vermilya-Brown Co. v. Connell*, No. 22, October Term, 1948, 335 U. S. 377).

[2] In consequence of this same accident a number of other actions have been brought in the district courts whose disposition is dependent upon the determination of this case. *Betty Jane Barry, Admx. v. United States*, Civil No. 3091 (M. D. Pa.); *Margaret E. Lehr v. United States*, Civil No. 8595 (E. D. N. Y.); *Estelle A. Lewis v. United States*, Civil No. 8597 (E. D. N. Y.); *Anita M. Tierney v. United States*, Civil No. 8596 (E. D. N. Y.); *Elizabeth Z. Westerfield, Admx. v. United States*, Civil No. 43-526 (S. D. N. Y.); *Hazel P. Bell, Exrx. v. United States*, Civil No. 43-540 (S. D. N. Y.).

Respondent brought this action against the United States under the Federal Tort Claims Act in the District Court of the United States for the district in which she resided, alleging that the death of her husband was due to the negligence of the Government in the operation of Harmon Field (R. 2).[3] The complaint set forth the laws of Newfoundland which permit an action by the executor or administrator of a deceased person for death due to negligence (R. 3). A motion was made to dismiss the action, one of the grounds being that the court "lacks jurisdiction, as the claim herein arose in a foreign country" (R. 4).[4] The District Court granted the motion (R. 8). On appeal, the Court of Appeals reversed (R. 10-14), citing this Court's decision in *Vermilya-Brown Co.* v. *Connell*, 335 U. S. 377, as "persuasive, if not well-nigh conclusive, authority for reversal here. It is difficult to believe that an air base which is a possession under one Act is a foreign country, no less, under another" (R. 11), 171 F. 2d at 209.[5]

[3] Respondent also brought an action in the United States District Court for the Southern District of New York based on the laws of Newfoundland against the American Overseas Airlines, Inc., for deceased husband's employer. The court held there that the decedent was at the time of his death within the coverage of the New York Workmen's Compensation Law (N. Y. Consol. Laws, Ch. 67, Sec. 1, *et seq.*) and that this Act provides the exclusive remedy against the Airline for the death of the decedent. *Spiller* v. *American Overseas Airlines, Inc.*, 80 F. Supp. 344.

[4] Since institution of this action Newfoundland has become a province of Canada. N. Y. Times, April 1, 1949, p. 10, col. 5.

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that an action based on the laws of Newfoundland and arising out of alleged negligence at an air base in Newfoundland leased by the United States was not a claim arising in a foreign country and consequently excepted from the waiver of sovereign immunity contained in the Federal Tort Claims Act.

2. In reversing the order of the district court dismissing the complaint for lack of jurisdiction.

SUMMARY OF ARGUMENT

A. *Vermilya-Brown Co.* v. *Connell*, 335 U. S. 377, and *Foley Brothers* v. *Filardo*, 336 U. S. 281, as we read them, hold that in the absence of anything to the contrary it will be assumed that Congress intends a statute to apply only within the territorial jurisdiction of the United States, but that the use of the word "possessions" in the Fair Labor Standards Act, read in relation to the purposes of that statute, was thought to manifest an intention to reach such places as the leased bases.

The Tort Claims Act does not contain any language indicating an intention to enlarge coverage beyond the normal territorial scope. The Act does contain the word "possessions", but only in the phrase "United States district courts for the Territories and possessions". Since there are no United States district courts for the leased bases, it is clear that the word "possessions" in the Tort

Claims Act does not extend to them, whatever may be its meaning in other legislation.

Furthermore, the Tort Claims Act is explicitly made inapplicable to "any claim arising in a foreign country", which as a textual matter would apply to the leased areas. Any doubts as to this are resolved by the legislative history of the Act.

B. The Act's legislative history discloses that in excluding "any claim arising in a foreign country" from its coverage Congress intended to bar all claims based on foreign law. During the course of this history the character of the Act changed from a measure providing a narrow, primarily administrative, remedy, rigidly defined by Congress to one making available as broad a judicial remedy as local law allowed. The exception for claims arising in foreign countries was a concomitant of this change.

The word "possession" in the phrase conferring jurisdiction upon the district courts of the Territories and possessions of suits brought under the act is not descriptive of the geographical coverage of the Act but was intended only to identify the courts in which action may be brought. Even for that purpose it is intended most narrowly. This is shown by the fact that in amending the Judicial Code in 1948 the Senate Committee on the Judiciary deleted the phrase "Territories and possessions" and specifically designated in which of the possessions the district courts were given jurisdiction under the Act.

C. When Congress enacted the Federal Tort Claims Act, the United States was already in possession of the bases. When Congress intended in legislation passed contemporaneously to embrace these areas it used language specifically calculated to that end. Examples of this are the Defense Base Act, the War Damage Act, and the Foreign Claims Act. The failure in the Federal Tort Claims Act to distinguish the defense bases from other foreign territory is persuasive that Congress did not intend to differentiate between claims arising in these bases and others based upon foreign law.

D. The unwillingness of Congress to have tort actions determined by foreign law is reflected in two other acts contemporaneous with the Federal Tort Claims Act. In connection with amending the Foreign Claims Act, which authorizes the administrative settlement of claims based on acts of the armed forces arising in foreign countries, including specifically areas under the temporary or permanent jurisdiction of the United States, Congress, in order to permit the War Department to adopt its own regulations, repealed earlier legislation which would have compelled claims arising in certain areas to be determined by foreign law. In the Defense Base Act Congress replaced local law at the defense base areas, in the field of tort claims against private citizens based on the master-servant relationship, by a workmen's compensation law.

ARGUMENT

The Federal Tort Claims Act Is Not Applicable to Claims Arising in the Leased Bases

A. THE TEXT OF THE STATUTE.

In *Foley Bros. v. Filardo*, 336 U. S. 281, 285, this Court reaffirmed that "The canon of construction which teaches that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States * * * is a valid approach whereby unexpressed congressional intent may be ascertained." *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, was differentiated on the ground that "by specifically declaring that the Act covered 'possessions' of the United States, Congress directed that the Fair Labor Standards Act applied beyond those areas over which the United States has sovereignty and was in effect in all 'possessions.' This Court concluded that the leasehold there involved was a 'possession' within the meaning of the Fair Labor Standards Act."

The principle which we draw from the two decisions is that in the absence of anything to the contrary it will be assumed that Congress intends a statute to apply only within the territorial jurisdiction of the United States, but that the use of the word "possessions" in the Fair Labor Standards Act, read in relation to the purposes of that statute, was thought to manifest an intention to reach such places as the leased bases, over which

the United States had a substantial measure of control.

Application of this approach to the Federal Tort Claims Act might well lead to the conclusion that it does not extend to the leased bases even apart from the exception for "foreign countries" and the legislative history. For the scope of the statute is stated in general terms—"any claim against the United States"—just as was the statute involved in *Foley Bros.* v. *Filardo*—"every contract made to which the United States * * * is a party." There is no word or phrase indicating an intention to enlarge coverage beyond its normal territorial scope, such as the Court found in the word "possessions" in the Fair Labor Standards Act.

The Tort Claims Act does contain reference to "Territories and possessions", the same phrase found in the Fair Labor Standards Act, but in a different context and obviously with a narrower meaning. The phrase "United States district courts for the Territories and possessions of the United States" does not define the territorial scope of the statute, as in the Fair Labor Standards Act, but the district courts in which suits may be brought. Since the leased bases are not possessions in which there are United States district courts, it is clear that the word "possessions" in the Tort Claims Act does not extend to them, whatever may be its meaning in other legislation. The *Vermilya-Brown* case itself recognizes that the word "possessions" is not a word of art, and may have dif-

erent meanings in different contexts. 335 U.S. 386. Cf. *Steinbach* v. *Mo Hock Ke Lok Po*, 336 U.S. 368, 378-379; *Piedmont & Northern Ry.* v. *Interstate Commerce Commission*, 286 U.S. 299, 312.

Thus even if coverage were to be determined by the meaning of the word "possessions" as used in this particular statute, the result would be different from the *Vermilya-Brown* case. But fortunately Congress was more explicit in this statute, for it expressly provided that the Act should not apply to "any claim arising in a foreign country," certainly, as a textual matter, a leased area in Newfoundland is in a foreign country. That the leased bases are in "foreign" countries seems to be recognized in the *Vermilya-Brown* opinion, which not only accepted the view of the State Department that the leased areas were under British sovereignty, but characterized them as "foreign territory" (335 U.S. at 380, 390).

It is, of course, true that the United States has a substantial amount of control over the leased areas, and that they differ from other foreign soil in that respect. But the control which this country has over the leased areas is substantially less than that enjoyed in territories now under military occupation. Yet the district courts to which the question has been presented have uniformly dismissed claims arising in such areas as arising in a foreign country and therefore outside the scope of the Federal Tort Claims Act. *Brandl* v. *United States*, 77 F. Supp. 68 (S.D. N.Y.) (Saipan, under mili-

tary occupation); *Strauss v. United States*, 77 F. Supp. 240 (E.D. Pa.) (Port of Ghent, Belgium, then under control of the military forces of the United States); *Brewer v. United States*, 79 F. Supp. 405 (N.D. Cal.) (Okinawa, under occupation by American military forces); *Donahey v. Ishimatsu Co.*, 80 F. Supp. 180 (S.D. N.Y.) (Japan); *Lanhardt v. United States*, decided June 22, 1948, unreported (S.D. Cal.) (American occupied zone of Germany).

If there should be any doubt as to whether the leased bases should be deemed "in a foreign country", that doubt is resolved by the history of the phrase in the Tort Claims Act. This demonstrates that the phrase was included in the statute in its present form in order to preclude claims based upon foreign law, such as we have in this case. In addition, it is significant that the United States was in possession of the bases at the time the Tort Claims Act was enacted, and that in other contemporaneous legislation Congress used language specifically applicable to the bases.

We now turn to a detailed statement of the legislative history of the Tort Claims Act insofar as it bears upon this problem.

B. THE LEGISLATIVE HISTORY OF THE FEDERAL TORT CLAIMS ACT SHOWS THAT CONGRESS DID NOT INTEND THE ACT TO APPLY TO THE LEASED AREAS

Passage of the Federal Tort Claims Act in 1946 represented the culmination of years of unsuccess-

ful attempts through various Congresses to give effective recognition to the responsibility of the United States for torts committed by its representatives. During the course of this long legislative history the Tort Claims bill took the shape in which, with some changes not relevant here, it was ultimately enacted by the 79th Congress.

The legislative history of the Act falls into two distinct periods: the first starting with the 65th Congress and ending with the 74th, during which attention was focused on establishing administrative remedies for personal injury and property damage claims against the United States under rules of law established by Congress with only limited access to the courts, and a second, commencing with the 76th and ending with the enactment of the bill, during which the emphasis shifted from defining new remedies to making available whatever judicial remedies existed under the law of the place where the tort occurred. The exception for claims arising in a foreign country was the product of this second period, a concomitant of the shift from a narrow remedy, circumscribed and defined by Congress, to a judicial remedy as broad as local law allowed.

The first fruits of the efforts started in the 65th Congress[1] to provide a more satisfactory system

[1] In the third session of the 65th Congress Congressman French introduced H. R. 14737 authorizing the heads of departments to settle tort claims with a right of appeal to the Court of Claims and to review by the Supreme Court in claims exceeding certain minimum amounts. He reintroduced

for redressing Government torts than that provided by private bills was the passage in 1922 of an act, popularly called the Small Tort Claims Act.[5] This Act authorized the administrative settlement of property claims up to $1,000. Act of December 28, 1922, 42 Stat. 1066. Under it claims arising in foreign countries such as Turkey, China, Newfoundland, or Danzig pressed by either an alien or a citizen were settled in the same way as those arising territorially.[6]

Because of the acknowledged inadequacy of this Act and the limited relief afforded by it both to claimants and Congress, efforts continued to be made to have Congress enact a more liberal measure enlarging the amount which might be awarded for property damage, affording a remedy for personal injury, and granting limited access to the courts. Bills for that purpose were introduced in every Congress from the 68th to the 74th.[7]

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virtually the same measure in the 66th and 67th Congresses H. R. 4829, 66th Cong., 1st sess.; H. R. 62, 67th Cong., 1st sess. None of these bills ever left the Committee on the Judiciary to which they were reported. The first proposal to receive serious consideration was the much narrower bill introduced by Congressman Underhill, H. R. 7912, 67th Cong., 1st sess., which became the Small Tort Claims Act.

[6] Both the War and Navy Departments, under the authority of the Small Tort Claims Act, settled and reported to Congress claims of both aliens and citizens arising in foreign countries. H. Doc. 115, 68th Cong., 1st sess., p. 4 (China), p. 5 (Turkey, Canada); H. Doc. 275, 68th Cong., 1st sess., p. 3 (Haiti); H. Doc. 176, 69th Cong., 1st sess., p. 4 (Danzig); H. Doc. 640, 69th Cong., 2nd sess., p. 10 (England); H. Doc. 426, 71st Cong., 2nd sess., p. 5, 7 (China); H. Doc. 692, 71st Cong., 3rd sess., p. 5 (China). See also, documents cited footnote 16, *infra*.

[7] Through the bulk of these measures, set out in footnote 11, *supra*, a common thread can be traced. Three measures, however, introduced during this first period fall outside the

The earliest measure of this character on which favorable action was taken,[7] S. 1912, introduced and passed by the Senate during the 1st session of the 69th Congress (67 Cong. Rec. 5607) was simply an enlargement of the Small Tort Claims Act. S. Rept. 14, 69th Cong., 1st sess. The House, when the bill was referred to it, substituted under the same number its own measure prepared by the Committee on Claims which was to set the pattern for all subsequent bills during this first period. H. Rept. 667, 69th Cong., 1st sess.; 67 Cong. Rec. 11099.[8] Property damage and personal injury claims were handled separately. Property damage claims up to $5,000 in amount were to be settled administratively; above that jurisdiction over them was conferred on the district courts and the Court of Claims.[9] Personal injury claims were to be de-

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common pattern. H. R. 16062, 66th Cong., 3rd sess.; H. R. 8914, 69th Cong., 1st sess.; H. R. 8561, 73rd Cong., 2nd sess. Each of these bills waived sovereign immunity to suit on tort claims. All died in committee and none appeared to have influenced contemporary thinking. Consequently, no other reference is made to them in this brief.

[7] During the 2d session of the 68th Congress two measures (H. R. 12178 and H. R. 12179) were introduced to provide a remedy for claims for personal injuries. They died in committee.

[8] When the House received the Senate bill it was engaged in considering H. R. 8651—which had been reported favorably by the House Committee on Claims. H. Rept. 209, 69th Cong., 1st sess. This was one of two virtually identical bills. H. R. 6716 was the other, introduced by Congressman Underhill, chairman of the Committee on Claims, who had also been the sponsor of the Small Tort Claims Act. The House had H. R. 8651 on the table (67 Cong. Rec. 11111) after the Committee on Claims reported S. 1912, amended so as to practically duplicate H. R. 8651. H. Rept. 667, 69th Cong., 1st sess.

termined by the United States Employees' Compensation Commission with no right of review or suit in the courts. Specific provisions governed such matters as the effect to be given contributory negligence, intoxication, aggravation of the injury through failure to secure medical care, and the order of distribution of death benefits (Secs. 201, 204, 205). Similar provisions were thereafter inserted in every subsequent bill of this period.[10] Certain types of claims for property damage and personal injury were specifically excepted from the coverage of the bill, such as those arising out of the carriage of the mail or the actions of the Alien Property Custodian. (Secs. 8(a), 208.) A similar, although varying, list of exceptions was also to appear in every bill thereafter introduced.[11] None during this first period, however, contained an exception based either on alienage or the place of origin of the claim.

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[10] See footnote 11, *infra*.

[11] In the following list the sections similar to Secs. 201, 204 and 205 of S. 1912 are given first, and those similar to Secs. 8 and 208, second: H. R. 9285, 70th Cong., 1st sess., Secs. 201, 204, 205—4(a), 208; S. 4377, 71st Cong., 2nd sess., Secs. 201, 204, 205—4(a), 208; H. R. 15428, 71st Cong., 3rd sess., Secs. 201, 204, 205—4(a), 208; H. R. 16429, 71st Cong., 3rd sess., Secs. 23(c), 24, 25—3, 27; H. R. 17168, 71st Cong., 3rd sess., Secs. 201, 203(c), 204, 205—3(a), 207; H. R. 106, 72nd Cong., 1st sess., Secs. 201(b), 203(c), 204, 205—3(a), 207; H. R. 5065, 72nd Cong., 1st sess., Secs. 201(b), 201(c)—203, 204—206; H. R. 9263, 72nd Cong., 1st sess., Secs. 2(b), 2(g), 3(a), 4, 5—6; S. 211, 72nd Cong., 1st sess., Secs. 201(b), 201(c)—206; S. 4567, 72nd Cong., 1st sess., Secs. 201(b), 201(c), 203, 204—206; S. 1833, 73rd Cong., 1st sess., Secs. 201, 203—206; H. R. 120, 73rd Cong., 1st sess., Secs. 2(b), 2(g), 3(a), 4, 5—6; H. R. 2028, 74th Cong., 1st sess., Secs. 2(b), 2(g), 3(a), 4, 5—6; S. 1043, 74th Cong., 1st sess., Secs. 201, 203, 204—206.

Due to the inaction of the Senate the bill, as revised and passed by the House (67 Cong. Rec. 11110), failed of passage in the 69th Congress. A pocket veto prevented a modified version, from which the Senate had eliminated the right of suit in the courts, from becoming law during the 70th Congress.[12] Of the thirteen bills introduced in the next four Congresses only three even reached the floor and no action was taken on these. With the 75th Congress, in which no bills in this field were introduced, the attempts at passage of a tort claims act were temporarily abandoned.[13]

[12] S. 1912, as revised in the House during the 69th Congress, was reintroduced virtually unchanged by Congressman Underhill in the 1st session of the 70th Congress as H. R. 9285. H. Rept. No. 286, 70th Cong., 1st sess. It passed the House (69 Cong. Rec. 3179) and was referred to the Senate Committee on Claims. That committee changed it very substantially. The right of suit in the courts was eliminated, and very extensive powers were given to the General Accounting Office which was authorized to settle claims up to $1,000 for property loss and damage, subject only to review by certiorari in the Court of Claims, and to audit and settle, without further review, claims for personal injury or death up to $7,500 after receiving the report and recommendation of the United States Employees' Compensation Commission. S. Rept. 1699, 70th Cong., 2d sess. Because the Comptroller General, in addition, was placed in charge of appeals to the Court of Claims from his own decisions the bill, which passed both houses (70 Cong. Rec. 4836, 4839), was vetoed by President Coolidge. 70 Cong. Rec. 295 (Part 6, Index). H. Rept. No. 2800, 71st Cong., 3rd sess. McGuire, *Tort Claims Against the United States*, 19 Geo. L. J. 133, 134, 135.

[13] From the 71st to the 74th Congress thirteen bills, modeled more or less on the act vetoed by President Coolidge, were introduced. Four gave a right of review in the Court of Claims on claims up to $1,000 and a right of suit over that amount: H. R. 10429, 71st Cong., 3rd sess.; H. R. 17168, 71st Cong., 3rd sess.; H. R. 106, 72nd Cong., 1st sess.; H. R. 9263, 72nd Cong., 1st sess. The remainder, however, rejecting, as vetoed act in affording as the only judicial relief a right

When the attack on the available procedure for the redress of tort claims against the Government was renewed in the 1st session of the 76th Congress, it was with a substantially revised measure, introduced in the House as H. R. 7236, and in the Senate as S. 2690, drafted by the Department of Justice in collaboration with other government agencies and with the support of the American Bar Association. Hearings before the Committee on the Judiciary, House of Representatives, 77th Cong., 2nd sess., on H. R. 5373 and H. R. 6463 (hereinafter referred to as "Hearings"), p. 41. This new measure substituted for the elaborate structure of administrative and legal remedies found in the previous bills a simple right of suit against the United States in the "Court of Claims and the district courts" for property damage or personal injury caused by the fault of a Government official or employee while acting within the scope of his employment. It continued the authority of administrative agencies under the Small Tort Claims Act to settle claims of less than $1,000, extending it to include claims for personal injury. Although the new legislation differed radically from its predecessors, several of the features of the bills common to the first period were carried

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to review the administrative award by certiorari in the Court of Claims. These bills are listed in footnote [illegible] *supra*. In the 71st Congress two were reported favorably (S. 4377, reported in S. Rept. 700, 71st Cong., 2nd sess., H. R. 17168, reported in H. Rept. 2800, 71st Cong., 3rd sess.), only one in the 72nd Congress (S. 4567, reported in S. Rept. 658, 72nd Cong., 1st sess.), and none thereafter reached the floor.

over, such as those barring recovery for injuries due to contributory negligence, intoxication or wilful conduct, establishing the order of distribution of compensation for death, and governing aggravation of damages. Secs. 204, 302, and 304. Like its predecessor the bill also contained a list of exceptions to which had been added for the first time, however, "Any claim arising in a foreign country in behalf of an alien." Section 303 (12). The legislation, after being reported favorably after hearings by the House Judiciary Committee (H. Rept. 2428, 76th Cong., 3rd sess.), passed the House (86 Cong. Rec. 12032), but failed to be considered by the Senate before the close of the session.

Between the 1st session of the 77th Congress, when the tort claims bill was reintroduced in the form in which it had passed the House of Representatives in the preceding Congress (H. R. 5373), and the 2nd session, further work was done on the proposed legislation within the Department of Justice and numerous changes were made. The revised version, introduced as H. R. 6463 and S. 2221, differed from its predecessors principally in the emphasis placed on local law.[14] Recovery on claims against the United States was to be allowed "under circumstances where the United States, if a private person, would be liable to the claimant for such damage, loss, injury or death, in accord

[14] Two other bills which died in committee were introduced during this period. H. R. 5299, 77th Cong., 1st sess., S. 2207, 77th Cong., 2d sess. Both were minor variations of the other bills then under consideration.

ance with the law of the place where the act or omission occurred." (Secs. 201, 301.) Because local law was to determine not only the validity of the claim but also the defenses to it and other incidental matters, the revised measure omitted the provisions found in the prior bills governing such points.[15]

As a corollary to these changes making local law decisive, the phrase "in behalf of an alien" was eliminated from the exception so as to bar all claims "arising in a foreign country" brought by an alien or a citizen. The purpose of this deletion was to prevent claims from being governed by foreign law. Francis M. Shea, Assistant Attorney General in charge of the Claims Division, who explained the various changes made in the proposed Tort Claims bill to the House Committee on the Judiciary, said on this point (Hearings, *supra*, p. 35):

> *Mr. Shea:* * * * Claims arising in a foreign country have been exempted from this bill,

[15] In a memorandum submitted by Mr. Shea, Assistant Attorney General, to the Committee on the Judiciary of the House of Representatives in the course of the hearings it held on the Tort Claims bill, this is set out explicitly, as follows (Hearings, p. 27):

> (2) Conformance to local law is called for by H. R. 6463, not only in respect of the merits of the claim, but also in respect of the availability of defenses and the distribution or disposition of the recovery in cases of death. Hence, such provisions in H. R. 5373 as those concerning distribution of compensation for death (sec. 204), defenses of contributory negligence or willful misconduct (sec. 302), aggravation of damages (sec. 304), and payment of recovery in case of death pending the determination (sec. 308) are omitted as unnecessary.

See also Hearings, p. 61.

H. R. 6463, whether or not the claimant is an alien. Since liability is to be determined by the law of the situs of the wrongful act or omission it is wise to restrict the bill to claims arising in this country.[16] This seems desirable because the law of the particular State is being applied. Otherwise, it will lead I think to a good deal of difficulty.

Mr. Robsion: You mean by that any representative of the United States who committed a tort in England or some other country could not be reached under this?

Mr. Shea: That is right. That would have to come to the Committee on Claims in the Congress.[17]

The exception as revised to exclude all claims arising in foreign countries was contained in all subsequent drafts of the Tort Claims bill and was enacted as part of the Tort Claims Act by the 79th Congress without further discussion.[18] Even with-

[16] Congress was aware, at this time, that claims were arising outside the United States and in the defense base areas. Such claims were included in the reports being submitted to Congress contemporaneously of claims settled under the Small Tort Claims Act. H. Doc. 790, 77th Cong., 2nd sess., pp. 48, 65, 66, 68, 104 (Newfoundland), p. 68 (British West Indies); S. Doc. 174, 77th Cong., 2nd sess., pp. 24, 26 (Newfoundland); S. Doc. 265, 77th Cong., 2nd sess., p. 17 (Newfoundland).

[17] In a study prepared by the Department of Justice on the differences between H. R. 5373, the original bill as introduced in the 1st session of the 77th Congress, and H. R. 6463, the revised bill introduced during the second session, incorporated in the report of the hearings held by the House Committee on the Judiciary on the two bills, and in a comparison between the two bills reproduced as Appendix IV to that report, the same explanation of the change as made by Mr. Shea is given. Hearings on H. R. 5373 and H. R. 6463 pp. 29–66.

[18] The shape of the Federal Tort Claims Act was largely determined during its consideration in the course of the 77th Congress. Subsequently the bill was reintroduced without

out the explanation given by Mr. Shea for the exclusion of claims arising in foreign countries, the exception of all actions based upon foreign law can be understood as a concomitant of the change in the character of the measure, from one providing a narrow remedy rigidly defined by Congress to one making available whatever rights local law gave against private individuals.[19]

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substantial modification or further hearings until its enactment during the 79th Congress. The revised version of the tort claims bill introduced during the 2d session of the 77th Congress, S. 2221, was reported favorably by the Senate Committee on the Judiciary (S. Rept. No. 1196, 77th Cong., 2d sess.), and passed the Senate. 88 Cong. Rec. 3174. The House Committee on the Judiciary, to which the measure was then referred, which had been holding hearings on H. R. 6463, the companion measure to S. 2221, the bill passed by the Senate, reported the bill favorably (H. Rept. 2245, 77th Cong., 2d sess.), but it was never considered by the House. It was reintroduced in the 78th Congress (H. R. 1356, 78th Cong., 1st sess.; S. 1114, 78th Cong., 1st sess.), but no action was taken and again in the 79th Congress (H. R. 181, reported in H. Rept. 1287, 79th Cong., 1st sess.). It was finally passed by the 79th Congress as part of the omnibus Legislative Reorganization Act; 60 Stat. 842.

[19] It may perhaps be suggested that the existence of a specific exception for claims arising in the Canal Zone (Section 421(g)) in addition to that for claims arising in a foreign country indicates that the Canal Zone was not considered a foreign country and is therefore some evidence that the defense bases are also not foreign countries within the meaning of the Act. The legislative history of the exception made for the Canal Zone precludes attaching any such construction. It was inserted long before the exception for claims arising abroad and was perpetuated for entirely separate reasons. In view of the conflict of opinion as to the status of the Canal Zone (see footnote 6, p. 19 of Government brief in *Vermilya-Brown Co. v. Connell*, No. 22, October Term, 1948, 335 U. S. 377) reliance on the general exception of claims arising in foreign countries to bar claims arising in the Canal Zone might well have proved misplaced. An exception for "Any claim against the Panama Canal arising from injury to vessels or cargo while passing through the locks of the Panama Canal or while in Canal Zone waters" was first placed in the draft of the bill

It is, of course, clear that respondent's cause of action rests upon foreign law; the complaint relies explicitly upon the laws of Newfoundland (R. 2).[20] Thus, therefore, is the very type of case

introduced as H. R. 17168 during the 3rd session of the 71st Congress. All subsequent drafts contained this exception, including H. R. 7236 introduced during the 76th Congress which was the first bill to contain the exception for "any claim arising in a foreign country in behalf of an alien." In the course of the hearings on H. R. 7236 before Subcommittee No. 1 of the House Committee on the Judiciary, Bernard F. Birdsall, Legal Advisor to the Panama Canal Zone, requested that the language be amended to conform to the Canal Zone Code by broadening the exception to exclude any claims arising from injury to the crew or passengers, as well as to the cargo of vessels. (pp. 26, 27). H. R. 7236, as reported by the Committee, contained the exception, changed as requested, with the explanation that claims arising in Canal Zone waters had been excepted "as provision is made for them by the Canal Zone Code" (H. Rept. 2428, 76th Cong., 3rd sess., p. 5). This language appeared in every subsequent draft of the bill until its enactment. It was not until the 2d session of the following Congress that the exception for claims arising in a foreign country was broadened by eliminating the phrase "in behalf of an alien." (S. 2221 and H. R. 6463, 77th Cong., 2d sess.) It is not apparent that any consideration was given the effect of this change on the exception carried over from the previous bills of claims arising in the Canal Zone. Since careful draftsmanship alone would have dictated the retention of the specific exception for claims arising in that Zone, even after the broad exclusion from the Act of claims arising in a foreign country, in view of the anomalous status of the Panama Canal Zone under current Court decisions (cf. *Wilson* v. *Shaw*, 204 U. S. 24, 33 with *Luckenbach S. S. Co.* v. *United States*, 280 U. S. 173, 177), no significance should be attached to it.

[20] There can be no question of the applicability of the laws of Newfoundland to the Harmon Base. Specific provision is made in the leasehold terms to secure limited exemptions for the base personnel from certain aspects of that law, as for example the tax (Article XVII), immigration (Article XIII) and customs (Article XIV) laws. Other provisions similarly evidence the acceptance by both contracting parties of the dominion of the territorial laws over the leased areas, such as that securing a right of audience for [illegible] the territorial courts whenever a member of the United States forces is made a party to a legal proceeding because of his official acts (Article VII), that providing for service of local

the exception for claims arising in foreign countries was designed to reach.

Before leaving this phase of the legislative history it might be desirable to advert to one point made by the court below the clarification of which rests in large measure on the history of the Act. In the fact that the district courts given jurisdiction under the Act, as passed by the 79th Congress, are specified as those for the "Territories and possessions" the court below found support for its position that the Federal Tort Claims Act, like the Fair Labor Standards Act, extends to the leased areas. 171 F. 2d at 209. However, as the legislative history shows, the word "possessions" was used in the Act, not to describe its coverage, but only to identify the courts in which action might be brought.

In the earliest draft of the Tort Claims bill giving a right to suit in the courts, jurisdiction was conferred "on the Court of Claims and the district courts." H. R. 7236 and S. 2690, 76th Cong., 1st sess. When H. R. 7236 was before the House for consideration, Mr. King inquired as to whether "district courts" embraced the District Court of Hawaii (86 Cong. Rec. 12021), and the bill was amended in include that court specifically (86 Cong. Rec. 12028). In the revision of the act made by

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process (Article VI), and that waiving the motor vehicle tax on vehicles belonging to the United States (Article XII) Executive Agreement Series 235, Leased Naval and Air Bases (GPO, 1942).

the Department of Justice during the course of the 77th Congress tort jurisdiction was given not only to the district court for Hawaii but to those for the other Territories and possessions as well. Other than the statement that it had been made, no explanation was given of this change (Hearings, pp. 27, 31, 43, 61), and it is unlikely that either the Department of Justice or Congress thought that it in any way impinged upon the exception made simultaneously of all claims based on foreign law.[21]

That the only function of the word "possession" in the Act is to identify the courts in which suit may be brought, and that even there it was intended most narrowly, appeared most clearly during the revision of the Judicial Code by the 80th Congress in 1948. In place of the blanket reference to the courts of the "Territories and Possessions", the Senate Committee on the Judiciary substituted language specifically designating those courts given

[21] In the Defense Base Act (55 Stat. 622, 42 U. S. C. 1651), enacted contemporaneously, in which it was intended to give district courts of the United States jurisdiction over acts committed on the defense bases, the jurisdictional language employed was very different from that used in the Federal Tort Claims Act which was intended to apply only territorially. Whereas the Federal Tort Claims Act gives jurisdiction to the "United States district court for the district wherein the plaintiff is resident or *wherein the act or omission complained of occurred*," (emphasis added) the Defense Base Act provides that judicial proceedings "shall be instituted in the United States district court of the judicial district wherein is located the office of the deputy commissioner whose compensation order is involved if his office is located in a judicial district, and if not so located, such judicial proceedings shall be instituted in the *judicial district wherein the injury occurred*." (Emphasis added.)

jurisdiction under the Act. These are the courts for Hawaii and Puerto Rico, which are not specifically named since they are included in the term "district courts" as used throughout the Code (28 U.S.C. 91, 119, 132), and those for Alaska, the Canal Zone and the Virgin Islands. 28 U.S.C. 1346(b). The change was explained as follows (S. Rept. 1559, 80th Cong., 2d sess. (p. 6):

> * * * in at least one of the possessions there are local district courts which are not intended to have tort-claims jurisdiction but which would be included by the general terms of the language which the amendment strikes out. The specific inclusion of the courts of the three remaining Territories and possessions thus makes for clarity and precision.

It is significant that the Senate Committee on the Judiciary, which had been the responsible committee in the Senate during the development of this phase of the Act in the 76th and 77th Congresses,[22]

[22] The Senate Committee on the Judiciary had been charged with the consideration of the earliest version of the bill drafted by the Department of Justice conferring jurisdiction only on the "Court of Claims and the district courts" (S. 2690, 76th Cong., 1st sess., 84 Cong. Rec. 7834), with the measure as revised in the House, to include "the United States District Court for Hawaii" (H.R. 7236, 76th Cong., 1st sess., 86 Cong. Rec. 12065) and with the final version in which all the "district courts for the Territories and possessions" were included. (S. 2221, 77th Cong., 2d sess., 88 Cong. Rec. 586). It reported the latter favorably (S. Rept. 1196, 77th Cong., 2d sess.). Although in the 79th Congress it was replaced by a Special Committee on the Organization of Congress, the Federal Tort Claims Act being made a part of a general reorganization act, s. 2177 (S. Rept. 1400, 79th Cong., 2d sess., p. 29), there

did not consider these changes other than as clarifying the statute. The intention not to include even all the recognized possessions within the broad designation of the "district courts of the Territories and possessions," clearly demonstrates that there could have been no intention to embrace areas held only under lease.

C. WHEN CONGRESS DRAFTED AND PASSED THE ACT, IT WAS AWARE OF THE ANOMALOUS CHARACTER OF THE DEFENSE BASES AND CHOSE LANGUAGE TO EXCLUDE CLAIMS ARISING ON THEM FROM ITS COVERAGE.

When the language of the exception carving out claims arising in foreign countries from the coverage of the Act crystallized during the 77th Congress, and passed the 79th Congress, we were already in possession of the defense bases and Congress was already cognizant of the problems raised by them.[23] When Congress intended particular legislation passed during this period to embrace the defense base areas it used language calculated

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can be no doubt, in view of the role played by it in the 77th Congress when the bill crystallized, of its responsibility for the present language. See footnote 2, *supra*.

[23] The Judiciary Committee of the House, which took a leading role in the development of the legislation, was peculiarly cognizant of the problems raised in the field of tort liability by the dual jurisdiction of two sovereignties over the local areas. This was precisely the problem to which it had directed its attention in the hearings it had held on the Defense Base Act. See unpublished hearings before the House Judiciary Committee on H.R. 5096, 77th Cong., 1st sess. The change in the language of the Federal Tort Claims Act to exclude all claims arising in a foreign country whether in behalf of an alien or citizen was made with the approval of the Committee in the session following these hearings.

to that end. The Defense Base Act, passed during the 1st session of the 77th Congress and amended the following session, specifically applies to "*any military, air, or naval base acquired after January 1, 1940, by the United States from any foreign government*", 55 Stat. 622, amended, 56 Stat. 1035; 42 U. S. C. 1651. The War Damage Act, passed by the 2nd session of the 77th Congress, applies to "such property situated in the United States (including the several States and the District of Columbia), the Philippine Islands, the Canal Zone, the Territories and possessions of the United States, *and in such other places as may be determined by the President to be under the dominion and control of the United States*"[24] (italics added), 56 Stat. 174, 176, 15 U.S.C. 606b-2. The Foreign Claims Act, passed by the 1st session of the 77th Congress and amended during the 78th Congress, applies to a "foreign country, *including places located therein which are under the temporary or permanent jurisdiction of the United States.*" (Italics added.) 55 Stat. 880, amended, 57 Stat. 66, 31 U. S. C. 224d. Congress could have used

[24] A member of the House Committee on Banking and Currency, to which the legislation had been referred in response to a question as to what was contemplated by the "additional coverage" of the clause, "in such other places • • •" as it appeared in the bill as reported by the Committee, stated without correction (88 Cong. Rec. 1851):

> As I recall—and I can be corrected by my colleagues if I do not state it correctly—that referred to Navy bases and Army bases under the control and jurisdiction of the United States wherein there may be private property connected with them.

similar language in the Tort Claims Act if it meant that statute to be applicable to the bases.

In the Federal Tort Claims Act, however Congress had no reason to treat the defense bases differently from any other territory located abroad, since the reason for excluding claims arising in foreign countries—the unwillingness of Congress to have the liability of the United States determined by the local law of a foreign sovereignty applied with the same force to these areas as to any other foreign territory. Congress therefore deliberately excepted, without qualification, "any claim arising in a foreign country" so as to exclude all claims, including those arising on defense bases, dependent upon foreign law. Cf. *United States* v. *Powell*, 330 U. S. 238, 244-245.

D. IN LEGISLATION CONTEMPORANEOUS WITH THE ACT CONGRESS INDICATED ITS UNWILLINGNESS TO HAVE CLAIMS ARISING ON THE DEFENSE BASES DETERMINED BY LOCAL LAW.

The conclusion suggested by the legislative history of the Tort Claims Act that Congress did not wish to subject itself to liability based upon foreign law, regardless of where the claim arose, is further supported by the fact that, in connection with two of the acts just referred to the Foreign Claims Act (55 Stat. 880, as amended, 57 Stat. 66; 31 U. S. C. 224d) and the Defense Base Act (55 Stat. 622, as amended, 56 Stat. 1035; 42 U. S. C. 1651), considered contemporaneously and by their

terms applicable to the defense base areas, Congress affirmatively indicated that it did not wish claims analogous to those falling within the Tort Claims Act arising in foreign territory to be governed by local law. Sutherland, *Statutory Construction*, 3rd Ed., Vol. 3, Secs. 6101-6105, pp. 156-163. Cf. *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381, 389.

The Foreign Claims Act, passed by the 77th Congress "for the purpose of promoting and maintaining friendly relations by the prompt settlement of meritorious claims," authorized the administrative settlement of claims on account of damages caused by the armed forces "in a foreign country or possession thereof, including places located therein which are under the temporary or permanent jurisdiction of the United States, to the property, public or private, or the persons of inhabitants of such foreign countries, where the amount of such claim does not exceed $1,000." 55 Stat. 880. In amending the Act a year later to raise the maximum allowable to $5,000 (57 Stat. 66) Congress, at the request of the War Department, specifically repealed an earlier act passed during the first World War authorizing payment of claims of inhabitants of European countries only where the claims "would be payable according to the law or practice governing the military forces of the country in which they occur." Act of April 18, 1918, 40 Stat. 532. The memorandum submitted by the War Department to the Committee on Claims for the House requesting repeal of the 1918

act stated, "It seems preferable that we be free to adopt our own regulations governing the payment of such claims." H. Rept. 312, 78th Cong., 1st sess.; S. Rept. 145, 78th Cong., 1st sess. By acceding to the request of the War Department, Congress inferentially authorized and approved the practice of the War Department of adopting its "own regulations governing the payment" of claims cognizable under the Foreign Claims Act, including those arising in the defense base areas.*

Just as Congress rejected local law as the criterion for the settlement of claims against itself arising in foreign countries, so equally did it indicate its intention to supplant local law within the defense bases by its own in the field of tort claims against private citizens based upon the master-servant relationship. Almost immediately upon our occupation of these bases, the War Department, because of the uncertainty created by the varieties of local law at these bases, requested Congress to enact legislation extending the Longshoremen's and Harbor Worker's Compensation Act to the leased areas so as to give all private employees on the bases the same protection as that enjoyed by employees in the United States regardless of the vagaries of local law. S. Rept. 540, 77th Cong., 1st sess.; H. Rept. 1070, 77th Cong., 1st sess. Despite the doubts expressed during the course of hearings by the House Judiciary Committee as

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* See Army Regulations 25-90.

to the power of Congress to supersede local law and remedies in the defense base areas (Unpublished hearings before the House Judiciary Committee on H. R. 5096, Thurs., July 24, 1941, pp. 8-9, 27), the language of the Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424, 1426, 33 U. S. C. 905), making the remedy provided by that act exclusive, was not changed when it was extended to the leased areas. 55 Stat. 622. And a year later, when the Defense Base Act was amended, the liability of any employer under it was specifically made exclusive of "all other liability * * * under the workmen's compensation law of any State, Territory or other jurisdiction." 56 Stat. 1035, 1036, 42 U. S. C. 1651.

Clearly, in construing the Federal Tort Claims Act an intention should not be imputed to Congress to permit suit against the Government based on the local law at these defense bases when the lawmakers not only specifically rejected foreign law as the basis for the administrative settlement of tort claims, but even endeavored to take out from under such law claims against private persons.

It is, of course, true that the broad purposes of the Tort Claims Act were to allow persons injured by the negligence of Government officials and employees an adequate judicial remedy, and thereby to relieve Congress of the burden of considering many private bills. But these general purposes, which might otherwise be applicable to the situation presented in this case, cannot be controlling

when Congress has clearly expressed its intention as to the specific problem.

It is to be noted that the Legislative Reorganization Act of 1946, of which the Federal Tort Claims Act is a part, did not prohibit all private bills for tort claims, but only those "for which suit may be instituted under the Federal Tort Claims Act."[25] 60 Stat. 831. Because claims arising in foreign countries are not cognizable under the Federal Tort Claims Act, the 80th Congress has passed private bills to compensate one claimant for personal injuries suffered in Newfoundland (Private Law 418, 80th Cong., 2d sess.; S. Rept. 1666 and H. Rept. 1743, 80th Cong., 2d sess.) and another for personal injuries and the death of his wife as a consequence of an accident in Belgium (Private Law 359, 80th Cong., 2d sess., S. Rep. 1346 and H. Rep. 2082, 80th Cong., 2d sess.). Similar measures have been introduced into the 81st Congress. H. R. 1470,

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[25] The "Legislative Reorganization Act of 1946" as originally introduced by Mr. La Follette banned all private bills authorizing "the payment of money for property damages, for personal injuries or death" (Sec. 121(a) of S. 2177, 79th Cong., 2d sess.). After being reported favorably in this form by the Special Committee on the Organization of Congress (S. Rept. 1400, 79th Cong., 2d sess.), it passed the Senate (92 Cong. Rec. 6578). In the draft of the Act prepared by the House Committee on the Organization of Congress and offered and considered as a committee substitute for S. 2177 (92 Cong. Rec. 10056) the language was changed so as to bar only private bills authorizing "payment of money for personal injuries or death for which suit may be instituted under the Federal Tort Claims Act" (Sec. 131 of Committee bill, 92 Cong. Rec. 10071). The bill passed the House in this form (92 Cong. Rec. 10104) and the Senate concurred in the House amendment. 92 Cong. Rec. 10139-10152.

reported favorably in H. Rept. 524, 81st Cong., 1st sess. (Pozzuoli, Italy); S. 471, reported favorably in S. Rept. 449, 81st Cong., 1st sess. (Saipan); H. R. 3618, reported favorably in H. Rept. 882, 81st Cong., 1st sess. (Giessen, Germany).

CONCLUSION

For the reasons stated, it is respectfully submitted that the decision below should be reversed.

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